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No. 736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

J. WEINGARTEN, INC., *Petitioner,*

v.

THE FEDERAL TRADE COMMISSION, PAUL RAND DIXON, *Chairman,* PHILIP ELMAN, *Member,* A. EVERETTE MACINTYRE, *Member,* JOHN R. REILLY, *Member,* MARY GARDINER JONES, *Member,* WALTER R. JOHNSON, *Hearing Examiner,* ERNEST D. OAKLAND, *Complaint Counsel*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. Weingarten, Inc., a corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on September 14, 1964.

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* The substitution of Commissioners Reilly and Jones for Commissioners Sigurd Anderson and A. Leon Higginbotham, Jr., two of the original parties, reflects recent changes in the composition of the Commission. (Rule 48(3))

OPINIONS BELOW

The opinions of the District Court for the Eastern District of Texas (App. A, *infra*, pp. 19a-46a)[1] are not officially reported but are unofficially reported at 1963 Trade Cas. ¶70,790 (oral opinion) and 70,845 (written findings of fact and conclusions of law). The opinion of the court of appeals (App. A, pp. 1a-18a) is reported at 336 F. 2d 687.

JURISDICTION

The judgment of the court of appeals which is here sought to be reviewed was entered on September 14, 1964. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission violated Sections 5(c), 7, and 12 of the Administrative Procedure Act, 5 U.S.C. §§ 1004(c), 1006, and 1011, thereby depriving petitioner of its fundamental right to a fair hearing, by prejudging the issues in the case and directing that the hearing examiner find that petitioner had violated Section 5 of the Federal Trade Commission Act.

2. Whether the Commission violated the requirement of Section 6(a) of the Administrative Procedure Act, 5 U.S.C. § 1005(a), that it proceed with "reasonable dispatch," by remanding an administrative proceeding that had been pending before it for a period of eight years (five years of investigation and three years of litigation) for retrial to implement an arbitrary prejudgment.

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[1] Herein, "App." refers to Appendix; "R." to certified record; and "S.R." to certified supplemental record.

3. Whether the court of appeals had jurisdiction to consider the appeal from the district court in view of the fact that the Commission, in compliance with the district court's order, dismissed its complaint, thus mooting the ultimate issue on appeal.

STATUTES INVOLVED

The statutes involved are reproduced in Appendix B, pp. 65a-67a.

STATEMENT

Petitioner, J. Weingarten, Inc., is a corporation organized and existing under the laws of the State of Texas with its principal office at 600 Lockwood Drive, Houston, Texas. It is a retail grocery chain doing business in the Eastern District of Texas with stores located in Texas, Louisiana, and Tennessee.

After prolonged investigation commencing in 1955, the Commission issued its complaint on January 5, 1960, charging that petitioner had violated Section 5 of the Federal Trade Commission Act[2] by knowingly inducing and receiving discriminatory allowances from suppliers which it knew were illegal under Section 2(d) of the Clayton Act. It was further alleged that seven specified suppliers did not make such allowances available on proportionally equal terms to their other customers competing with Weingarten.

Beginning on June 30, 1960, administrative hearings were held before a hearing examiner during the course of which trial counsel for the Commission introduced

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[2] In pertinent part Section 5 provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

oral testimony of numerous witnesses and many documentary exhibits. Following the closing of the record on May 29, 1961, both sides filed extensive briefs, proposed findings of fact and conclusions of law; and the hearing examiner heard oral arguments. In its proposed findings and conclusions petitioner urged, among other things, that Commission counsel had failed to prove the essential fact of violation that other customers of the same suppliers, who competed with petitioner in the sale of the same goods, had not received or been offered similar allowances. At no time did Commission counsel seek permission to adduce additional evidence on this or any other issue in the case; nor did they ever contend that there was any further evidence which could or should be adduced.

On May 1, 1962, the hearing examiner issued his initial decision in which he concluded that petitioner had knowingly induced and received promotional allowances in violation of the Federal Trade Commission Act. Petitioner immediately appealed this determination to the full Commission.

Eleven months later, on March 25, 1963, the Commission issued its order and opinion in which it reversed the hearing examiner and held, after a "review of all of the evidence," that its trial counsel had failed to establish the elements of the alleged violation. As for petitioner's contention that there has been a failure of proof on the critical issue of whether other customers of its suppliers competed with Weingarten, the Commission stated that Weingarten ". . . contends that this meager showing was not made in this record and, upon review of all of the evidence, we must conclude that it is right." But instead of dismissing the complaint, the Commission remanded the case to the hearing

examiner for the taking of further evidence, commenting that proof sufficient to establish the violation "should not be difficult to adduce." (App. A, p. 53a)

In the course of its remand opinion, the Commission said:

> "This case . . . is fraught with a great deal of public interest, for its successful prosecution may affect the cessation of a whole series of law violations [by third persons not parties to this proceeding]" (App. A, p. 49a);
>
> * * *
>
> "These witnesses [10 witnesses from alleged competitors] were probably in command of the facts needed to satisfy this criteria but the examination by counsel failed to elicit them." (App. A, pp. 53a-54a);
>
> * * *
>
> "While the Commission is sympathetic to the proposition that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act, we are faced in this instance with a dearth of factual information upon which to predicate a finding that the sponsoring wholesalers and their affiliate groups were, or were not, 'customers' [within the meaning of the Act] of their suppliers." (App. A, p. 56a);
>
> * * *
>
> "This matter has now been in litigation for slightly more than three years and both the public and the respondent have incurred substantial expense in its trial." (App. A, p. 58a);
>
> "As we stated earlier, this case is attended with a great deal of public interest and to now order dismissal for failure of proof . . . would waste all of the money and effort heretofore expended." (App. A, p. 58a);
>
> * * *

> "There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel." (App. A, p. 58a);
>
> * * *
>
> "It is not contemplated that more than five full hearing days for each side will be needed to adequately *shore up* this record although the Commission sees no need to actually order a limitation on the length of the hearings." (Emphasis added) (App. A, p. 59a).

On April 29, 1963, petitioner filed in the district court the instant complaint for declaratory judgment and injunctive relief on the grounds that the Commission's remand order was motivated by prejudgment of the issues and was in violation of Section 6(a) of the Administrative Procedure Act requiring federal agencies to "proceed with reasonable dispatch to conclude any matter presented to it . . . "[3]

The Commission, in response, filed on May 3, 1963, a motion to dismiss or in the alternative for summary judgment. After further pleadings and hearing, the district court denied the Commission's motion and granted the basic relief requested by petitioner.

The district court held that the Commission had failed to act with reasonable dispatch in violation of the Administrative Procedure Act by remanding the complaint to the hearing examiner for "a retrial of once-litigated issues." (App. A, p. 41a) The court noted that the order of remand was made "after the matter had been under consideration by the Commission for some 8 years—5 years of investigation and 3

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[3] 5 U.S.C. § 1005(a).

years of litigation" (App. A, p. 33a), that "there is no basis in the record for the suggestion that facts sufficient to make a case against plaintiff [Weingarten] should have been available to government counsel, nor is it reasonable to conclude that such facts could be made available at this late date" (App. A, p. 37a), that "there is very little likelihood of success to the extent of finding testimony that would establish a complaint against Weingarten" (App. A, pp. 40a-41a), and that "there is no assurance how long it would actually take to perfect the hearing, under the order of remand" (App. A, p. 41a).

On the question of prejudgment, the district court found "that the Commission's remand was made for the purpose of finding evidence detrimental to Weingarten," that the court could not "help but feel that the Commission was somewhat displeased, to put it as an understatement, in not being able to find sufficient evidence or substantial evidence to justify the charges, and to support the Hearing Examiner's original decision" and that "the facts in this particular case show some evidence of unfairness on the part of the Commission, and some bias and prejudice which sheds some light upon the Commission's action in remanding this case." (App. A, p. 33a)

The district court concluded that unless the Commission was restrained from proceeding according to the plan announced in its opinion and order of remand, petitioner would be irreparably injured (a) because of lack of opportunity to challenge the remand "if hearings are held," (b) because court review of proceedings under Section 5 of the Federal Trade Commission Act is available only after "the damage is done and the violations of the . . . [petitioner's] rights, as alleged

herein, have prevailed and had their full force and effect," and (c) because the remand could serve as an additional delay and there is "no assurance how long it would actually take to perfect the hearing, under the order of remand." (App. A, p. 43a)

The district court's order did not prohibit the holding of further proceedings by the Commission but only prohibited remand to the hearing examiner. Further, the court did not direct the Commission to enter any particular type of final order. It did direct that "within ninety (90) days from May 15, 1963, defendant Federal Trade Commission . . . make and issue a final order, disposing of said case before the Federal Trade Commission." (App. A, p. 46a)

On July 24, 1963, the Commission filed its notice of appeal to the court of appeals. The next day it filed motions with the court of appeals requesting a stay of the district court's order and expedition of the appeal. The court of appeals declined to grant the requested stay, and on August 13, 1963, the Commission dismissed its complaint against petitioner.

On appeal the court of appeals reversed the decision of the district court and remanded the case with directions to the district court to dissolve the injunction issued by that court. This petition seeks review of that decision and order.

The district court's jurisdiction was based upon Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, and Section 1 of the Declaratory Judgment Act, 28 U.S.C. § 2201.

REASONS FOR GRANTING THE WRIT

I.

Prejudice in the administrative process has become a serious problem. Every litigant is entitled to a hearing "by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration,"[4] but the Federal Trade Commission in this case, in substance, directed the hearing examiner to reopen the case for further evidence and then find petitioner guilty. This direction to the hearing examiner was made in the face of a record, 8 years in the making, which admittedly did not establish any violation of law. In exhibiting prejudice and bias in its order of remand, the Commission below clearly violated Sections 5(c), 7(a) and (b), and 12 of the Administrative Procedure Act.[5]

The Commission's prejudgment of this case is manifested throughout its opinion accompanying the remand. The district court holding on this point was

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[4] *Inland Steel Co.* v. *NLRB*, 109 F.2d 9, 20 (7th Cir. 1940); see also *Morgan* v. *United States*, 304 U.S. 1, 14-15 (1938); *Railroad Comm'n of Cal.* v. *Pacific Gas & Elec. Co.*, 302 U.S. 388, 393 (1938); *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 304-05 (1937).

[5] Section 7(a) of the Administrative Procedure Act provides that "The functions of all presiding officers and of officers participating in decisions . . . shall be conducted in an impartial manner." The right and duty of the examiner to decide a case free from the arbitrary dictates of others is also made manifest by the provisions of Section 5(c) regulating the examiner's conduct (5 U.S.C. § 1004(c)) and by the provisions of Section 7(b) outlining the substantial powers granted to the examiner in the conduct of hearings (5 U.S.C. § 1006(b)). Section 12 provides that ". . . all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." (5 U.S.C. § 1011)

based upon specific findings of fact, but the court of appeals disregarded those findings without determining that they were "clearly erroneous"[6] and reversed the district court.

Basic tenets of the Administrative Procedure Act have almost been ignored by federal agencies and courts alike. Although the district court's decision here was based solely on the provisions of that Act, the court of appeals barely paid lip service to its provisions. It is now time, we submit, for this Court to breathe life into this important statute which unfortunately has become almost moribund through disuse and lack of enforcement. As stated by this Court in one of the first cases interpreting the Administrative Procedure Act, ". . . it would be a disservice to our form of government and to the administrative process itself if the Court should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 41 (1950).

One of the fundamental purposes of the Act was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge" (*Ibid.*). To remedy this problem the Act provided for *independent* hearing examiners. As stated in an early report on the Act:

> "Creation of independent hearing commissioners *insulated from all phases of a case other than*

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[6] The findings of a trial court "shall not be set aside unless clearly erroneous . . . ." Rule 52(a), Fed. R. Civ. Proc. Where an appellate court is charged with the responsibility of reviewing the lower court's findings to determine whether they are clearly erroneous, yet leaves the findings of the lower court undisturbed, the Supreme Court will accept the findings of the trier of fact. See *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 15 (1962).

> *hearing and deciding* will, the Commission believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation.'"[7] Emphasis added)

Despite the clear mandate of the Act, the court of appeals below disregarded the findings of prejudgment by the district court and held that the Commission, without censure, may tell its hearing examiner that there is evidence of a party's guilt, that such evidence can be easily adduced, and that the public interest requires issuance of an order against the party. In short, the Commission directed the examiner to adjudge petitioner guilty. To uphold such a decision would render the requirements of the Administrative Procedure Act a nullity, and persons appearing before administrative agencies under such conditions would be denied a fair hearing before an impartial trier of the facts.

The biased attitude of the Commission in this case is demonstrated by its criticism of its own staff counsel's so-called "mistakes" in failing to convict petitioner.[8] Further, the Commission clearly evidenced prejudgment when it stated that the "successful prosecution [of petitioner] may affect the cessation of a whole series of law violations" and thus make it unnecessary for the Commission to expend time and money "to bring complaints against each supplier suspected of granting a discriminatory promotional

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[7] Administrative Procedure in Government Agencies (Rep. Atty. Gen. Comm. Admin. Proc.) 56 (1941), S. Doc. No. 8, 77th Cong. 1st Sess. 56 (1941); quoted by Court, *id.* at 44.

[8] "There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel." (App. A, p. 58a; footnote omitted.)

allowance to [Weingarten]" (App. A, p. 49a); that the Commission in this case *"is sympathetic to the proposition* [of Commission counsel] that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act" (App. A, p. 56a, emphasis added); and that the Commission's sympathy can result in conviction of petitioner if Commission counsel will make a "more detailed showing as to the operations of the [voluntary cooperative retail] groups, particularly with respect to their dependence upon the participating wholesalers" (App. A, 56a).

In so giving the examiner a blueprint for conviction, the Commission abandoned the role of judge for that of prosecutor. Reviewing courts have condemned administrative officials who overstep the line that divides judging from prosecuting. In *NLRB* v. *Phelps,* 136 F. 2d 562, 567 (5th Cir. 1943), the court stated:

> "Such an attitude, excusable if not commendable in a prosecutor, is a wholly improper one in a judge or an examiner who sits in judicial place to hear and determine facts, draw conclusions of law and make reports and recommendations based thereon."

Indeed, so jealously does our law regard the right to a fair trial before an impartial tribunal that not only must the trial in fact be fair and impartial, but there must be no "appearance" of unfairness or partiality. In *In Re Murchison,* 349 U.S. 133, 136 (1955), this Court held that not only is actual fairness required, "but our system of law has always endeavored to prevent even the probability of unfairness." In further comment, this Court stated:

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice

> equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. Offutt v. United States, 348 U.S. 11, [14 (1954)]."[9]

Apart from conflicting with the decisional law and the requirements of the Administrative Procedure Act,[10] the decision of the court below is also contrary to the recent holding of the Court of Appeals for the District of Columbia in *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964). In that case, the reviewing court set aside an order because the Chairman of the Federal Trade Commission had in a public speech manifested prejudgment of a party's guilt. The court of appeals held that "a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act." (*Id.* at 760) Such prejudgment, the court held, "amounted in the circumstances to a denial of due process which invalidated the order under review." (*Ibid.*)[11]

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[9] See also *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

[10] In the instant case, the court of appeals below also erred by ignoring the well-established requirement that administrative agencies are under a stricter standard with respect to a fair and impartial hearing than are others because many of the normal procedural safeguards are not available in agency proceedings. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 304-05 (1937); *NLRB* v. *National Paper Co.*, 216 F.2d 859, 868-69 (5th Cir. 1954).

[11] On October 28, 1964, the government filed a petition for a writ of certiorari but it did not seek review of the ruling on prejudgment. See *Federal Trade Commission* v. *Texaco, Inc. and the B. F. Goodrich Co.*, No. 635. Subsequently, on October 29, 1964, Chairman Dixon disqualified himself in five other cases pending before the Federal Trade Commisison, since the companies in those cases were also discussed in the same speech involved in the *Texaco* case. See *In Re Pure Oil Co.*, F.T.C. Docket No. 6640.

The increased frequency of cases of bias and prejudgment by administrative officials reveals that authority is being exercised with no clear understanding of the separate roles of judge and prosecutor. The lines between these two functions have become blurred.[12] In this case the Commission, perhaps without deliberate realization, assumes the function of prosecutor. In sanctioning such prejudgment, the court of appeals below disregarded the requirements of the Administrative Procedure Act and due process of law. Its decision further conflicts with other courts of appeals decisions on what constitutes prejudice in administrative action.

We submit that because of the ever-growing seriousness of the problem of prejudgment by administrative officials and the conflict in decisions, a review of this case should be granted.

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[12] The need for clarifying standards to root out the evil of prejudice in administrative proceedings has been acknowledged by one member of the Federal Trade Commission. In remarks before the Federal Bar Association on September 11, 1964, Commissioner Elman stated: "Improvements of the fairness of agency adjudication will not come until agency members frankly acknowledge, and conscientiously seek to avoid, the dangers inherent in the fusion of functions with the administrative process." (Speech, p. 8)

See also this Court's statement in *Morgan* v. *United States*, 304 U.S. 1, 22 (1938): "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplyng agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

II.

"There can be little doubt that the protracted delays accompanying agency adjudications constitute a serious and notorious shortcoming in administrative procedure."[13]

Because it was universally recognized that excessive delay was a characteristic of administrative proceedings, Congress provided in Section 6(a) of the Administrative Procedure Act that "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it . . ." (5 U.S.C. § 1005(a)) and provided further in Section 10(e) that the district court may "compel agency action unlawfully withheld or unreasonably delayed" (5 U.S.C. § 1009(e)).[14]

Notwithstanding this, the court of appeals below said:

> "But we think it would be the extremely rare case where a Court would be justified in holding . . . that the passage of time and nothing more presents an occasion for the peremptory intervention of an outside Court in the conduct of an agency's adjudicative proceedings." (App. A, pp. 7a-8a)

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[13] Montgomery, *Administrative Discovery*, 16 Stanford Law Review 1061, July 1964; see also Fascell, *Complexities and Delays in Administrative Procedures Must Be Eliminated*, 46 A.B.A.J. 49 (1960); Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down*, 49 A.B.A.J. 833 (1963); Landis, *Report on Regulatory Agencies to the President-Elect*, Sub-Comm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 86th Cong., 2d Sess., Report (Comm. Print 1960); Prettyman, *Reducing the Delay in Administrative Hearings: Suggestions for Officers and Counsel*, 39 A.B.A.J. 966 (1953).

[14] Section 2(g) defines "agency action" to include "failure to act" (5 U.S.C. § 1001(g)).

Of course there was "something more" here. The additional delay, created by the remand, was for the sole purpose of implementing an arbitrary prejudgment of a law violation.

The opinion of the district court relied to a great extent upon its finding that the Commission violated Section 6(a) in ordering a useless remand. It is undisputed that the Commission spent five years investigating petitioner's activities and another three years actually litigating the question of whether petitioner had violated the law. At the end of this eight year period, the Commission finally concluded that there was no record evidence upon which petitioner could be found to have violated Section 5. It nevertheless ordered further proceedings in the case although, as later found by the district court, the Commission had no evidentiary basis for such a remand. (App. A, pp. 37a, 40a-41a, 42a-43a)

The district court found, and this finding was left undisturbed by the court of appeals, that there is no evidence from which it may be concluded that the deficiencies in proof noted by the Commission in its opinion of March 25, 1963, can be easily remedied or that any evidence exists which Commission counsel might have used to show a violation of the Federal Trade Commission Act by petitioner. (App. A, p. 37a)

In reversing the district court, the court of appeals so construed Section 6(a) as to deprive it of its vitality to correct the abuses of delay. If its interpretation prevails, parties to proceedings before administrative agencies will be subject to unreasonable delay and harassing tactics which, in the long run, can serve only to weaken respect for the administrative process and

justify further dilatory techniques on the part of agency staff personnel.

Moreover, the construction given by the court below to Section 6(a) conflicts with the holding of the Fourth Circuit in *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961), that courts have a duty of enforcing the statutory requirement that administrative agencies proceed with "reasonable dispatch." In that case, the reviewing court upheld the grant of injunctive relief where an agency remanded a case for retrial of litigated issues in the absence of a showing that there was newly discovered evidence or other good cause for the failure to adduce the evidence during the original hearings. Although the court was not there concerned with an abusive command to find a violation as in the instant case, it did point out that a respondent in an administrative proceeding cannot be required to participate in "supplemental hearings which are repetitive, purposeless, and oppressive . . . ." (*Id.* at 868)

III.

That part of the court of appeals' decision holding that the dismissal of the complaint by the Commission on August 13, 1963, did not make the matter moot conflicts with prior decisions of this Court.

Fundamental to the whole judicial process is the *absolute* requirement that a court have jurisdiction over the parties and subject matter before it can legitimately render its judgment thereon. Further, one can proceed in a federal court only when there is a "case" or "controversy." U. S. Const. Art. III, § 2. Yet the court of appeals here heard an appeal and assumed

jurisdiction of a cause which had already become moot by reason of the dismissal of the complaint.

The court of appeals' entire discussion of this issue follows (App. A, p. 18a):

> "In light of the foregoing, it is apparent that the injunction must be dissolved.[27] That means, of course, that the Commission is free to reinstate the case on its docket and proceed pursuant to the remand.
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>
> [27] The conditional nature of the Commission's dismissal of the proceedings makes inapposite the authorities cited by Weingarten in support of the contention that the matter is now moot."

It is submitted that the court erred in assuming that the Commission's dismissal was conditional in nature and in ignoring a long line of authority from this Court holding that a court is deprived of jurisdiction upon performance of the act to which the moving party has contended it is entitled.

The district court's order stated, in pertinent part (App. A, p. 46a):

> "Within ninety (90) days from May 15, 1963, defendant Federal Trade Commission and . . . [other named defendants] make and issue a *final order, disposing of said case before the Federal Trade Commission.*" (Emphasis added)

On August 13, 1963, the 90th day following the district court's order, the Commission issued an order of dismissal with an accompanying opinion. The opinion recited facts surrounding the prosecution of the complaint and the issuance of the district court's order of July 11, 1963. (App. A, p. 62a-64a) It also stated that the order of dismissal was entered "solely for the purpose of *complying with the* above-noted *order of*

the District Court." (App. A, p. 64a; emphasis supplied) Thereupon the Commission entered the following order:

> "IT IS ORDERED that the Commission's complaint in this proceeding be, and it hereby is, dismissed without prejudice to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid order of the District Court becomes ineffective as a matter of law." (App. A, p. 64a)

The court of appeals assumed that since the Commission had reserved the right to "reopen" the case under certain circumstances, it had not in fact dismissed the administrative complaint. If, however, the Commission was in fact complying with the order of the district court, as it stated it was doing, its order of dismissal was "a final order, disposing of . . . [the Weingarten case] before the Federal Trade Commission." (App. A, p. 64a) It hardly seems open to question that the Commission unconditionally dismissed the complaint; the language in the Commission order with respect to possible *reopening* is surplusage.

In determining what the Commission actually did on August 13, 1963, with respect to the complaint, it is helpful to note its own language to the court of appeals with respect to what it would have to do if a stay of the district court's order were not granted. In its motion requesting such a stay pending appeal (filed with the court of appeals on July 29, 1963), the Commission stated that it would suffer "irreparable injury" if the stay were not granted (S.R. 4) and that "the district court has entered an injunction order which, if not stayed, will render the issues moot prior to the time in which an appeal proceeding can properly be decided by this Court" (S.R. 12), and, further,

"without *pendente lite* relief the Commission will be forced to take affirmative action that will result either in the final dismissal of an action that it had instituted or the issuance of an order upon a record as to which the Commission has raised questions. *The damage to be done will be irreparable.*" (S.R. 13; emphasis supplied) Later in the same motion, the Commission recognized that the district court ordered the Commission to "make a 'final order, disposing of said case' before the Commission. This order will disturb, rather than maintain the status quo, by requiring the Commission to dispose of the subject matter of the litigation. *In addition, such an order would grant relief which is final or ultimate in nature.*" (S.R. 25; emphasis supplied) The Department of Justice and the Commission further advised the court of appeals by telegram on August 13, 1963, that

> "We respectfully urge that if the District Court's order is not stayed today, the appellants may choose only to finally dispose of the administrative proceedings referred to in the District Court order or face the possibility of a contempt charge." (S.R. 137)

The fact that the Commission's order was issued in compliance with a court order does not affect the finality of the Commission's action.[15] This same issue arose

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[15] In this connection, it must be pointed out that the district court's order did not direct the Commission to find in favor of Weingarten but allowed the agency to "take such action as they wish and deem advisable to take in regard to finally disposing of this matter, consistent with said opinion, these findings and conclusions, and the Order herein entered." (App. A, p. 44a)

Under these circumstances, the Commission was not required to *dismiss* the complaint; other alternatives were open to it. Thus, by dismissing the complaint, it is assumed that the Commission intended to terminate the litigation.

in *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923), where this Court stated, *id.* at 218:

> "It is urged that the permit was issued by the inspector of buildings only because he believed it was incumbent upon him to comply with the judgment of the court of appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate .... The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance."[16]

It is well settled that "where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and remand the case with directions to dismiss." *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936).[17] The court below ignored this controlling principle of law.

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[16] Accord, *e.g.*, *Oil Workers Unions* v. *Missouri*, 361 U.S. 363 (1960); *American Book Co.* v. *Kansas ex rel. Nichols*, 193 U.S. 49 (1904).

[17] Accord, *e.g.*, *United States* v. *Anchor Coal Co.*, 279 U.S. 812 (1929); *Atherton Mills* v. *Johnston*, 259 U.S. 13, 16 (1922); *Heitmuller* v. *Stokes*, 256 U.S. 359 (1921).

CONCLUSION

This case presents important questions in the enforcement of the provisions of the Administrative Procedure Act which guarantee due process in administrative proceedings. In addition, the decision of the court of appeals below conflicts with the District of Columbia Circuit's opinion in *Texaco, Inc.* v. *Federal Trade Commission, supra,* the Fourth Circuit's opinion in *Deering Milliken Co.* v. *Johnston, supra,* and this Court's opinion in *Brownlow* v. *Schwartz, supra.* Accordingly, it is submitted that the petition should be granted.

Respectfully submitted,

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